IN THE CIRCUIT COURT OF ELIZABETH CITY COUNTY, VIRGINIA.

LAKE & ROWE *v.* W. P. ISLEY.

Eminent Domain—Abandonment of Location—Reverter.—Where a public service corporation, under the right of eminent domain, acquires property for its necessary purposes, paying a fee simple value for it, and afterwards abandons it for another location, the company cannot dispose of it, but it reverts to the parties from whom it was taken.

This in a question of property condemned by the railroad for its necessary purposes, which has been abandoned by it, the powerhouse subsequently moved elsewhere—whether the railroad company could convey it to a subsequent purchaser, or whether it reverted to the parties from whom it was first taken, is the question for decision.

It is admitted that the first property was acquired by condemnatory proceedings; how the second was acquired I don't know, as it is not involved in this proceeding.

It is a well-known fact that this railroad runs from Old Point to Newport News; that the position of its powerhouse, located upon the lands which are in dispute, was nearer the water terminal than it was to Newport News, and while I do not know anything about electricity, I imagine the change of location was to get the powerhouse nearer the middle of the line.

Undoubtedly the property where the powerhouse was first put (although that does not appear in evidence) is more valuable than that upon which it is now located—I say I think it is because where it is now located is near midway between Hampton and Newport News, where property is not built up at all.

The question is, having acquired that property at its present location, and having transferred its powerhouse from the old location, whether the property used when the powerhouse was at its *original* location reverts back to the parties from whom it was *originally* obtained, or whether it passed absolutely to the railroad, and that they can transfer it to the parties defendant in this suit.

The deed conveying it was with special warranty, which is rather unusual, but I suppose it was to protect the railroad company.

There is a distinction to be made, or sought to be made, between the right of way (where the tracks are laid and the cars pass over) and the powerhouse. The large majority of cases, and practically all of them, to which I am referred come from cases of railroads operated by steam. Electric roads are comparatively of recent use in this country, and the authorities on electrical rail-

roads are much more scattered than those found relative to steam railroads, and the reason for that is particularly pertinent in this case, because the steam cars carry their power or raise their steam through the coal they carry with them, but the power that propels the cars on this line is generated at this powerhouse, and because of this there is a marked distinction, to my mind. You can only find decisions in regard to steam railways relative to rights of way (the place where the cars pass over), and probably some depots and grounds dependent on it. But here the question is property condemned for the purpose of erecting a powerhouse upon it, which was to carry all the cars by the power emanating therefrom. This is the difficulty which I think pertains more particularly in this case; and that is why you will find authorities as to the right of way (the place where the rails are laid) and not the property *owned* by the company. In almost every case you have referred me to freight depots, passenger depots and to the actual ground upon which the rails were laid. If I mistake not, you have not referred me to an electrical case. Therefore, the authorities that are used by the judges in arriving at the wise conclusions that they have reached in these particular cases are not authorities directly bearing on this case. I know you will answer that electricity can be transferred that far, but this is a question of *distance*. Suppose when the railroad first started, it had its powerhouse in Newport News on Washington Avenue, between 25th and 30th Streets, which is now the business section, and it had been built there when property was not so valuable, and afterwards the property was condemned under the statute by regular proceedings; now is it possible that they could sell that property from where Schmeltz Bank is to the First National Bank of Newport News, move their powerhouse across Salter's Creek (where property is not near so valuable), sell the first property for its enhanced value, and say "we paid fee simple value for it, and we will put the powerhouse where we can get land that is cheap?" I am not acquainted with values as you are, but I can see that the new location is a place covered by low, scrubby oak, and I think a blind man can see that where they moved from is more valuable.

Why does the statute say they shall pay a fee simple value? It is because they presume it is to be a permanancy. When you lay down a line of track, you dig the roadbed, put down the ties and steel, and double track it, as you have done with this railroad in some places; you expect an increased traffic, and that is what was done in this community. You bought the property at its then price; you paid the fee simple value (I admit it says that), because they expected you to stay there, and I do not suppose there is a man in the sound of my voice that expects to see them taken up, as there will be an electric line from here to Newport

News for all time unless they find a better mode of transportation. That property was obtained by condemnatory proceedings, by the working of the principle of eminent domain. What is that doctrine? That the public rights and needs and necessities shall not be tied up by the contrariness of one man; but while he can't tie you up, you have to pay the full amount of what his property taken is worth. You can't take it from him by force; you *have* to pay him for it. You have paid paid him for it in this case, and there is no question about that. But you paid him for it for what? For the purpose of this electric road, and you paid him for it in fee simple value because you expected it to be a perpetuity. It turns out that the necessities of the road require its powerhouse to be moved to some other place. Now, how did they get it? They got it because of their necessity. Why did they give it up? For reasons which the company know. Can it give up this property and go to a cheaper place and then sell off this property at its enhanced value? If they got it in fee simple, they own from the centre of the earth to the height of heaven. Suppose there was a gold mine found running under that old powerhouse; is it possible that they could go to a cheap place, sell the first place, and that it would not revert to the owner of the soil? It is a fee, but the statute states it is a base or qualified fee. It is a fee that reverts, so to speak, to the owners of the land whenever it is not used for the purpose for which it was condemned, and the reason you have to pay fee simple value is that it is presumed you can't pay a yearly rental for it, because the owners do not want to rent it out. You take the land, and the owner does not know that he will ever get it back. If you chose to move to a cheaper place, the reason that pertained when the land was taken does not then pertain. Suppose they had put it in Washington Avenue (and at first property in Newport News was not very high). Of course you can very well answer that they would not want an electric road there if there were not very many people. Suppose they did locate it when Mrs. Finch owned practically all the town, and they knew it was going to be a town, and they put the powerhouse in the centre, could they sell the property at an enhanced value? (My remarks are always under the theory that it was condemned by statute.) That is the doctrine that is sought to be held here, and it does not appeal to me.

There are very few Virginia cases which bear directly upon it. You can find cases about the track. You can transfer the track, but that is relative to steam railroads, but you have not referred me to a case concerning electric roads.

I do not know what the necessities were, whether they required a larger powerhouse or not. I imagine they did. I do not suppose they would have gone to the expense of having a great, mod-

ern powerhouse if the necessities had not required it, but I know when they changed it they put it in a place where the land was cheaper than where it was originally located—I judge so from my observation in passing; in fact, *I knew it.*

You gentlemen, as I say, have not given me any direct cases in point. There are conflicting cases in other states and with the multiplicity of courts you can find almost any proposition decided), but I am particularly bound by the decisions in this state. I do not know of any direct decision, but those that come nearest to it certainly support the position I take. You have not produced an electric case decided in Virginia. You have produced steam-car cases, where the method of propulsion is steam produced by coal carried with the engine. The principle underlying it is the same. As I understand it, where a public service corporation, under the right of eminent domain, takes property, if it choses to give it up, it can not dispose of it, because the reason for taking it does not pertain; it points the necessity, not then existing.

The doctrine is simple—because it is necessary to you, you can condemn it, and if it ceases to be necessary to you, it reverts to the original owner.

Note.

Notwithstanding the language used in § 1105 f (9) of the Code of 1904 to the effect that a public service corporation, exercising the power of eminent domain under Chapter 46 B of the Code, shall be absolutely vested with a fee simple title, it would seem that nothing more than a base or qualified fee passes to the company, giving it a perpetual and continuous title only so long as it uses the land for the purpose for which it was taken, but that when such use is abandoned, the land shall revert to the estate of the original owner. That the legislature, in using the term "fee simple," did not contemplate a fee simple according to the technical legal meaning of that term, would seem to be clearly shown by the language used in ch. 19 of this same section: "But whenever a change of location authorized by this section shall be made, the title to lands, or to the interest or estate therein, condemned for the former location, shall revert to the original owner, his heirs or assigns."

As to any attempted distinction between the rules as to the relative right of railroads using steam and those employing electricity as the motive power, the Code of 1904, § 1105 f, ch. 1, expressly states that the word "railroad" as used in the act treating of eminent domain, "shall be construed to include any railroad, whether operated by steam, electricity or other motive power."

While it is true that there are no decisions in this state directly in point, yet the fact that the same provisions of the Code provide for condemnation by either quasi public or municipal corporations, would seem to render applicable those cases relative to the title acquired by municipal corporations proceeding under this act. The rule is well settled that the condemnation of land for use as a public highway gives only a right of passage over it, the absolute title remaining in the owner. Home *v.* Richards, 4 Call 441; Bolling *v.* Petersburg, 3

Rand. 563; Warwick *v.* Mayo, 15 Gratt. 528, 545; Jordon *v.* Eve, 31 Gratt. 1, 10; Petersburg R. Co. *v.* Burton, 1 Va. Dec. 397; Western Union Tel. Co. *v.* Williams, 86 Va. 696, 700, 11 S. E. 106; Hodges *v.* Seaboard, etc., R. Co., 88 Va. 653, 14 S. E. 380; Page *v.* Belvin, 88 Va. 985, 14 S. E. 843; Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982. While in Roanoke *v.* Berkowitz, 80 Va. 616, approved in Charlottesville *v.* Maury, 96 Va. 383, 31 S. E. 520, stress is laid upon the fact that a fee simple shall be vested, the point as to reversion was not before the court, but simply the question as to the amount of damages, and consequently there was no reason for construing that section relative to the rights arising on an abandonment by an attempted alienation.

Upon examination of the cases in other states, it will be seen that the weight of authority is, that where an easement has been acquired in land for a public use, and that use is abandoned, the easement is at an end, and the owner is restored to his original rights in the land.

In Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426, the court, in construing a statute similar to our own, made the following remark: "The use is vested in the public, but the reversionary title still continues in the owner of the soil. In my opinion, notwithstanding the language used, nothing more than an easement passed to the road, giving it perpetual and continuous title so long as it used the land, for the purpose for which it was taken, but, when that use was abandoned, then it would revert back to the owner of the premises;" which language is quoted with approval in Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118.

A question similar to this was decided in Vought *v.* Railroad Co., 58 O. St. 123, 164, 50 N. E. 442, in which case the court said: "A similar question arose in the case of McCombs *v.* Stewart, 40 O. St. 647, and it is there said, page 665, 'whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such effect can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied with the taking of an easement.' Citing Washington Cemetery *v.* Railroad, 68 N. Y. 591. The judge then quotes from Cooley as follows: 'In any case an easement only would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest.' Const. Lim. 559. A careful consideration of the act under which the Lateral Company acquired its lands for canal purposes, fails to disclose any purpose whatever to authorize it to acquire a fee simple therein. It is provided in § 8 of the act that it should be lawful for the directors 'to enter upon and take possession of lands, etc., necessary to make said canal;' and in case the lands are not given or granted, and they are unable to agree with the owner, to appropriate the same. When appropriated they are to take a complete title to the premises to the extent and for the purpose set forth in and contemplated by the act. The purpose contemplated by the act is the use of the land for canal purposes so long as the canal is maintained. So that when the use ends, the title they were permitted to take ends; for it is not a title in fee simple they are permitted to take, but a complete one for the uses and purposes of the canal. The company could not then, when the use ends, sell them to others; on the contrary, the lands must revert to the owner of the freehold." See, also, in this connection, Henry *v.* Dubuque R. Co., 2 Iowa 288.

It seems to be the settled law in North Carolina so far as judicial construction can settle a question, that a railroad company, by condemnation proceedings, only acquires an easement upon the land condemned to be used only for the benefit and protection of the road in its being operated, and not as a means of acquiring property for the benefit of the corporation. Shields *v.* Norfolk & C. R. Co., 129 Car. 1, 39 S. E. 582. In commenting on this rule, the court, in Shields *v.* Norfolk, etc., R. Co., 129 N. Car. 1, 39 S. E. 582, said: "For this position, the defendant cites § 1946 of the Code, which provides that all persons, parties to proceedings to condemn land for railroad purposes, 'shall be devested and barred of all right, estate, and interest in such real estate during the corporate existence of the company aforesaid.' This act seems to have been passed in 1871, and it must be admitted that it uses very strong language. But it cannot be supposed that it has been entirely overlooked by the profession and the court for 30 years; and this court has so often, since its enactment, held that a railroad only acquired an easement upon the land under condemnation proceedings, that we must take it to have put that construction upon the act of 1871. Railroad Co. *v.* Sturgeon, 120 N. C. 225, 26 S. E. 779; Beach *v.* Railroad Co., 120 N. C. 498, 26 S. E. 703; Lassiter *v.* Railroad Co., 126 N. C. 509, 36 S. E. 48; Greer *v.* Water Co., 127 N. C. 349, 37 S. E. 474; Blue *v.* Railroad Co., 117 N. C. 644, 23 S. E. 275."

In New York the case of Roby *v.* Yates, 70 Hun 35, 23 N. Y. Supp. 1108, has decided that where a railroad company ceases to use as its right of way land which it had appropriated for that purpose, and leases it to a person who takes exclusive possession, the company thereby abandons its easement, and the land reverts to the original owner from the easement; and for another case along this line, see Proprietors of Canals *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181.

In Ross *v.* Penn. R. Co. (Pa.), 4 Atl. 850, the supreme court of Pennsylvania held, that a railroad company taking land by virtue of its right of eminent domain does not acquire the fee, but only an easement, and cannot permanently use it for a different purpose from that for which it was taken.